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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B5

DATE: NOV 14 2011 OFFICE: NEBRASKA SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). The petition is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a semiconductor manufacturing company. It seeks to employ the beneficiary permanently in the United States as a market development engineer, and classify him as an advanced degree professional, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL),¹ accompanied the petition (Form I-140).

The Director determined that the beneficiary did not satisfy the minimum level of education specified on the labor certification. In particular, the Director determined that the beneficiary did not possess a master's degree in electrical engineering or a foreign equivalent degree.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision.

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree"

To be eligible for approval under the immigrant visa petition, the beneficiary must have all the education, training, and experience specified on the underlying labor certification as of the petition's priority date, which is the date the labor certification application was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).² In this case, the priority date is December 3, 2004.

¹ The Form ETA 750 was accepted for processing by the Department of Labor on December 3, 2004. On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new ETA Form 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an

The job duties of the certified position, market development engineer, are described in Part A, section 13, of the Form ETA 750. The minimum education, training, and experience required to perform the duties of the position are set forth in Part A, section 14, of the labor certification. As specified therein, the job requires a master's degree in electrical engineering and three years of experience in the job offered or in a related occupation.

Educational documents in the record show that the beneficiary, a French national, earned the following post-secondary credentials after receiving his "Diplome du Baccalaureat Technologie" from the Academie de Clermont-Ferrand in 1989:

- "Diplome d'Etudes Universitaires General (DEUG)" at the University of Clermont-Ferrand after a two-year course of study (1990-1992).
- "Licence es Sciences" in Electronics, Electrical Engineering and Automation at the University of Clermont-Ferrand after a one-year course of study (1993-1994).
- "Maitrise" in Electronics, Electrical Engineering and Automation at the University of Bordeaux after one-year course of study (1994-1995).
- "Diplome d'Etudes Superieures Specialisees (DESS)" in Microelectronics at the University of Bordeaux after a one-year course of study (1995-1996).

As evidence of the U.S. equivalency of this education, the petitioner submitted several evaluations from educational credentials consultants, which asserted that the DESS earned by the beneficiary in 1996 was equivalent to a master of science in electrical engineering from a U.S. university.

The documentation of record (letters from employers past and present) also shows that the beneficiary had the following jobs from 1996 through the priority date in December 2004:

- Engineering internship with the petitioner in Crolles, France, from February 5 to July 31, 1996.
- Analog consultant with Altran Technologies in Lyon, France, from January 20, 1997 to January 7, 2000.
- Market development engineer with the petitioner in San Jose, California, from January 2000 through December 2004 and beyond.

The job duties described in the letters indicate that the three positions closely paralleled one another. Moreover, a letter from the petitioner's human resource manager, dated January 29, 2007, indicated that the beneficiary had been performing the duties of the proffered position, in H-1B visa status, since January 2000.

immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

The Director denied the petition on July 29, 2008. While finding that the beneficiary had the requisite three years of employment experience specified in the labor certification, the Director determined that the beneficiary's educational credentials could not be accepted as equivalent to a U.S. master's degree. In accord with the Electronic Database of Global Education (EDGE) created by the American Association of Collegiate Registers and Admissions Officers (AACRAO), the Director determined that the beneficiary's "Maitrise" was equivalent to a U.S. bachelor's degree and the DESS that followed was equivalent to one year of graduate level study in the United States. The Director concluded that the DESS was not equivalent to a U.S. master's degree, and thus did not satisfy the minimum educational requirement of the labor certification.

On appeal, counsel reiterates the petitioner's contention that the beneficiary's education in France is equivalent to a master's degree in electrical engineering in the United States. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

Eligibility for the Classification Sought

As noted above, the Form ETA 750 in this case is certified by the DOL. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available, and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Immigration Act of 1990 added section 203(b)(2)(A) to the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

³ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision except for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (INS), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the INS specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with

anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *See Matter of Shah, supra*. Where the analysis of the beneficiary's credentials relies on work experience and/or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."⁴ In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree plus the requisite five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2).

For the classification of advanced degree professional the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). Cf. 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). (Emphasis added.)

On appeal counsel has submitted, in addition to copies the beneficiary's last three degrees – "Licence" (1994), "Maitrise" (1995), and "DESS" (1996) – the fourth evaluation of the beneficiary's educational credentials. Like the previous three, the fourth evaluation concludes that the beneficiary's education, capped by his DESS, is equivalent to a master's degree in the United States. These evaluations are at odds with AACRAO's Electronic Database for Global Education (EDGE),⁵ which evaluates the U.S. equivalency of the beneficiary's post-secondary degrees as follows:

⁴ Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

⁵ As previously mentioned, EDGE was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,600 institutions in over 40

- The “DEUG” (two-year program) is comparable to two years of university study in the United States.
- The “Licence” (one-year program following a DEUG) is comparable to one year of university study in the United States.
- The “Maitrise” (one-year program building on the previous two) is comparable to a bachelor’s degree in the United States.
- The DESS (one-year post-graduate program) is comparable to one year of graduate study in the United States.

Based on the above data the Director found that the beneficiary’s Maitrise – received after four years of post-secondary study in France, the last two of which specialized in electrical engineering and closely related fields – was equivalent to a U.S. bachelor’s degree in electrical engineering. The one year of post-graduate study that followed – culminating in the further degree of DESS in microelectronics – was not judged to be the academic equivalent of a U.S. master’s degree.

countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.*

According to its registration page, EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “Master’s” degree were only comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien’s three-year bachelor’s degree was not a foreign equivalent degree to a U.S. bachelor’s degree. Specifically, the court concluded that U.S. Citizenship and Immigration Services (USCIS) was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

Counsel claims that the Director's reliance on EDGE in determining the U.S. equivalent of the beneficiary's degrees, rather than the educational evaluations submitted by the petitioner, was misplaced. While counsel's claim as to the academic equivalent of the beneficiary's DESS is not devoid of merit, the AAO is not persuaded that it overrides the EDGE analysis. As discussed in the foregoing footnotes, EDGE is a broad based resource drawing on the expertise of higher education admissions and registration professionals representing academic institutions around the globe. Federal courts have expressly upheld the utilization of EDGE by USCIS in determining the U.S. equivalency of foreign degrees. Therefore, the AAO agrees with the Director that the beneficiary's DESS in microelectronics is not the academic equivalent of a U.S. master's degree.⁶

Qualifications for the Job Offered

The petition cannot be approved unless the beneficiary qualifies for the proffered position under the terms of the labor certification.

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference [immigrant visa category] status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

⁶ It is noted that the regulation at 8 C.F.R. § 204.5(k)(2) permits a beneficiary holding a baccalaureate degree or a foreign equivalent degree with five years of progressive experience to be classified as an advanced degree professional. However, as the Form ETA 750 in this case specifically requires a master's degree, the beneficiary's potential classification as an advanced degree professional based on this alternate definition need not be discussed further.

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: “The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.” *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found in Part A of Form ETA 750. This section of the application for alien labor certification – “Offer of Employment” – describes the terms and conditions of the job offered. It is important that the Form ETA 750 be read as a whole. The instructions for Part A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS⁷ may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education, training, and experience required for the proffered position in this matter, Part A of the labor certification states the following requirements:

Block 14:

Education: Master’s degree in electrical engineering

Experience: 3 years in the job offered or in a related occupation

The terms of the labor certification are clear. The employer specified that a master’s degree in electrical engineering is required for the proffered position. The employer did not state that a

⁷ On March 1, 2003, USCIS succeeded the INS pursuant to the Homeland Security Act of 2002.

bachelor's degree and work experience of five or more years would be considered equivalent to a master's degree. Thus, the beneficiary cannot rely on the regulation at 8 C.F.R. § 204.5(k)(2) to qualify for the proffered position because the requirements in the regulation do not match the requirements of the labor certification.

As previously discussed, the beneficiary's educational degrees include a "Maitrise" in electronics, electrical engineering, and automation from the University of Bordeaux, which culminated four years of post-secondary education in France, and a "Diplome d'Etudes Superieures Specialisees" (DESS) in microelectronics from the University of Bordeaux after a one-year course of study. According to EDGE, whose broad expertise on the U.S. equivalency of foreign educational credentials is recognized by USCIS, the "Maitrise" is comparable to a bachelor's degree in the United States and the DESS is comparable to one year of graduate study in the United States. Thus, neither the "Maitrise" nor the DESS, either singly or in combination, is equivalent to a U.S. master's degree.

Since the beneficiary does not have a foreign equivalent degree to a U.S. master's degree, he does not qualify for the proffered position of market development engineer under the terms of the labor certification.

Conclusion

The beneficiary does not qualify for the proffered position because he does not meet the terms of the labor certification, which require a U.S. master's degree or an equivalent foreign degree. For that reason the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed